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Nos. 90-757 and 90-1032

In the Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, ET AL., PETITIONERS

v.

CHARLES E. ROEMER, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES E. ROEMER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondents concede that the original version of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973 (1982), applied to state judicial elections. Resp. Br. 1 n.1, 16. Respondents also concede that Section 2 of the current Act applies to elections for members of the legislative and executive branches. Resp. Br. 19. Respondents seem to concede (albeit reluctantly and only implicitly) that Section 5 applies to state judicial elections. Resp. Br. 38 n.24. Finally, re-

spondents concede that Section 2 of the current Act applies to judicial elections insofar as intentional discrimination is at issue. Resp. Br. 15, 19. At the same time, respondents maintain that Section 2 can nonetheless be parsed in a manner that exempts judicial elections from the results test. In this regard, respondents' submission hinges entirely on the argument that judges are not "representatives" for purposes of that law or as a general matter. As support for that argument, respondents principally rely on the Fifth Circuit's reasoning in *League of United Latin American Citizens Council No. 4434* v. *Clements*, 914 F.2d 620 (1990) (en banc) (*LULAC*), cert. granted, Nos. 90-813 & 90-974 (Jan. 18, 1991).

We have already explained how the Fifth Circuit misinterpreted Section 2 both in this case and in *LULAC*. As we explained in our opening brief in this case and in our amicus brief in the *LULAC* case, the Section 2 results test applies to judicial elections, but the factors that set judges apart from other elected officials and that distinguish the judicial process from other aspects of government are matters that the courts can—and must—take into account under the "totality of circumstances" test of Section 2(b), 42 U.S.C. 1973(b). See 90-757 & 90-1032 U.S. Br. 17-36; 90-813 & 90-974 U.S. Br. 17-28. We make only the following additional points in reply:[1]

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[1] Respondents expend considerable effort on the facts of the case, contending that the district court correctly found that the Louisiana system does not violate Section 2. Resp. Br. 1-12. Similarly, some amici argue that the explanation for the low number of minority judges lies not in racial discrimination, but in the combination of two facts: (a) States often require that a lawyer have been a member of the state bar for a certain number of years before he is eligible to become a judge, and (b) there is currently a relatively low percentage

1. Respondents rely heavily on decisions by this Court and the lower federal courts concluding in certain other contexts that judges are not "representatives." Resp. Br. 23-29. In so doing, respondents mistakenly conclude that because judges are not "representatives" for some purposes, judges are not "representatives" for any purpose. In fact, those contexts have nothing to do with the proper definition of the term "representatives" in Section 2. Rather, as we have discussed, the scope of the term "representative" can vary depending on the legal question being considered, and it is clear that Congress used this term in Section 2 in its most general sense. 90-757 & 90-1032 U.S. Br. 20-32.

Respondents err in relying on decisions describing the proper role of the *federal* courts. Resp. Br. 25, citing *Mistretta* v. *United States*, 488 U.S. 361 (1989), and *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Article III judges are

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of minority attorneys who satisfy such requirements. See Georgia Amicus Br. 8-10 (Georgia requires bar membership for seven years to become a judge); Washington Legal Foundation (WLF) Amicus Br. 21-22 (Louisiana has a five-year bar membership requirement). See also Texas Br. 5 (Texas has a four-year bar membership requirement). The relevant question, however, is not whether the number of minority *judges* corresponds to the population of minority lawyers, but whether minority *voters* have an opportunity to elect candidates of their choice. In any event, even if respondent and amici have correctly identified the explanation for minority electoral success or failure, that issue is not before the Court at this time. The Fifth Circuit did not reach the merits of the Section 2 challenge in this case or in *LULAC*. The question raised by amici would be an appropriate matter for the court of appeals to resolve on remand if this Court holds that the Section 2 results test applies to judicial elections.

not elected. Whether or not they can be said in some sense to "represent" their district or circuit in the federal judiciary, their position is plainly not analogous to that of state judges who are elected from a particular area. Federal judges are given life tenure and salary protection precisely in order to insulate them from the viewpoints of the community. 90-757 & 90-1032 U.S. Br. 24 n.19. As Judge Higginbotham noted in *LULAC*, 914 F.2d at 636, one reason why States have voters select trial and appellate judges for fixed terms, rather than have governors (for example) appoint judges for life, is to ensure that the state bench remains responsive to the interests of the public by permitting the electorate periodically to turn out judges who fail in that respect. In that very practical sense, elected members of the state bench do represent the electorate, because such democratically accountable judges are directly authorized by the voting public to carry out the governmental function of adjudicating legal disputes.

Underlying respondents' argument is the mistaken assumption that Congress believed that a judge cannot be a "representative" and remain "independent." The two attributes, however, are not mutually exclusive, and the federal model is by no means the only way to establish an independent judiciary. At the same time, it does no disservice to elected state judiciaries to acknowledge that one reason why States limit the tenure of judges is to ensure that the bench remains directly accountable to the electorate.

2. Respondents invoke the canon of construction that federal statutes will not be interpreted to alter the federal-state balance unless Congress has clearly stated its intent to interfere in state prerogatives.

Respondents maintain that Congress did not legislate with sufficient clarity to subject state judicial elections to the Section 2 results test. Resp. Br. 32-34.[2] That canon, however, does not assist respondents. Congress passed the Voting Rights Act for the express purpose of regulating the States' electoral rules and process, see *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); this Court has stated that the Act should be read "broad[ly]" so that it can achieve its remedial purposes, *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567 (1969); and respondents concede both that the term "representatives" includes every elected member of state government *other* than judges and that Section 2 *does* apply to judicial elections insofar as intentional discrimination is involved. Under these circumstances, it is respondents that

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[2] One of the respondents in *LULAC* makes a similar argument based on the principle that a statute should be construed to avoid having it declared unconstitutional. Entz Br. 23-35. That claim lacks merit. That canon is "quite often useful in close cases, or when statutory language is ambiguous," but it is "not a license for the judiciary to rewrite language enacted by the legislature." *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989), quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985). That canon comes into play only if there are "fair alternatives" to the supposedly unconstitutional interpretation, *United States* v. *Rumely*, 345 U.S. 41, 45 (1953), or if a different construction of a law is "fairly possible," *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). See *City of Rome* v. *United States*, 446 U.S. 156, 172-173 (1980) (rejecting the suggestion that the Court should adopt a "saving construction" of Section 5, because "the statutory meaning and congressional intent are plain"). See also *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979); *Swain* v. *Pressley*, 430 U.S. 372, 377-378 & n.11 (1977).

have the burden of explaining why Congress carved out an exception for judges from the otherwise comprehensive scope of Section 2.

Respondents attempt to make subsection (a) into the "intent" subsection and subsection (b) into the "results" subsection. Resp. Br. 17-18. The text of Section 2 lends no support to respondents in this regard. Subsection (a) states that the Act is violated if a state law "*results* in a denial or abridgement of the right of any citizen * * * to vote on account of race or color * * * *as provided in subsection (b) of this section*," while subsection (b) identifies the "results" test (emphasis added). Thus, if the text of Section 2 is sufficiently broad to include elected judges, as we believe it to be, the text of that provision shows as well that the results test is applicable to judicial elections.

3. Respondents rely on the special role that courts have played throughout our history in the impartial adjudication of disputes and in the protection of individual rights against the other branches of government and the public. Resp. Br. 29-32. That unique function, respondents argue, strongly militates against treating judges in the same manner as other elected state officials for purposes of the Voting Rights Act.

We agree with the premise of respondents' argument and much of their reasoning, but we disagree with their conclusion, since, as we explained in our opening brief (at 34-35), that conclusion is not faithful to the text and purposes of Section 2. As we also explained, Section 2 requires the courts to consider the "totality of circumstances" when analyzing a Section 2 claim, and one of the "circumstances" that must be considered is whether the challenged state electoral

procedure "is rooted in a strong state policy divorced from the maintenance of racial discrimination." *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973), aff'd on other grounds *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976). See 90-813 & 90-974 U.S. Br. 17-24.[3] The Act therefore accommodates the concerns discussed by respondents as well as the ones that prompted Congress to revise the Act in 1982.

4. Respondents note that the "one person, one vote" rule does not apply to the election of judges, *e.g.*, *Wells* v. *Edwards*, 409 U.S. 1095 (1973), summarily aff'g 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), so a State is free to draw judicial districts without regard to their relative populations. It is therefore, respondents point out, *always* possible to find or construct a judicial district in which minorities form the majority of the registered voters, even if the district is quite small. Applying vote dilution principles to judicial elections, according to respondents, will inevitably lead to a guarantee of proportional representation and safe seats for minority-favored candidates, which Section 2 in terms

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[3] Amicus WLF maintains that "the nature of the office holder's function appears nowhere in the statute or the legislative history as a circumstance to be considered." WLF Amicus Br. 20. The text of Section 2, however, refers expressly to the "totality of circumstances," and the Senate Report on the Act relied explicitly on a list of 23 decisions, principally from the Fifth Circuit, that had applied the vote dilution standard adopted by the Fifth Circuit in *Zimmer* v. *McKeithen* and applied by this Court in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and *White* v. *Regester*, 412 U.S. 755 (1973). See S. Rep. No. 417, 97th Cong., 2d Sess. 23, 31-32, 33 (1982). See generally 90-757 & 90-1032 U.S. Br. 29.

disavows. The only way to escape that syllogism, respondents submit, is to exclude judges from the ambit of the term "representative." Resp. Br. 40-45.

Respondents' argument misses the mark in the setting of this case, because Louisiana has decided to elect supreme court justices on a district-by-district basis, rather than on an at-large basis. Having made the judgment that a district-by-district system of electing supreme court justices best implements state electoral policy, Louisiana is hardly in a position to contend that drawing judicial district lines in a different manner in the one geographic location that is a multimember district is alien to its electoral process. For that reason, we argued in our opening brief (at 35-36) that, unlike Texas, Louisiana cannot invoke the policy justifications offered in defense of at-large judicial elections. Whatever merit respondents' argument may have in other contexts, it has considerably less force in this one.

The problem identified by respondents, however, does arise in connection with the at-large election of judges. It perhaps would be acute when a geographically compact and politically cohesive minority population is very low (*e.g.*, 5%) and the current number of sitting judges cannot be proportionally divided into districts in a way that reflects the potential voting strength of that minority population (*e.g.*, there are only 5 judges). In such a case, it may be infeasible to draw a district of any reasonable size that has a majority of eligible minority voters. Our interpretation of the Voting Rights Act, however, allows the courts to treat that factor under the "totality of circumstances." It also permits a State to show that it has a strong interest in having judicial districts that are sufficiently large as to avoid

the fact or appearance of bias—" 'home-town' justice," Resp. Br. 38—in its judicial system. The State has a legitimate interest in such matters, and they are ones that may be considered under Section 2.

5. Respondents and the State of Georgia contend that unique remedial problems arise if judges are deemed to be representatives. For example, States often increase the number of trial judges in order to keep pace with the increasing number of cases that must be handled within a district, even when the population remains the same. Treating judges as "representatives," the argument goes, will require each State to undergo the quite burdensome process of redrawing the lines of its judicial districts every time that the State authorizes new judgeships in order to lighten the burgeoning caseload of trial and appellate courts. Resp. Br. 36-39; Georgia Amicus Br. 14-16. That argument mistakenly assumes that adding new judgeships at-large or allocating them in a fair manner (such as randomly, or in some sequence) would necessarily violate Section 2, which we would dispute. That argument also mistakenly assumes that the only permissible remedy for a Section 2 violation in connection with judicial elections is the use of single-member districts. As we have argued, Section 2 requires the courts to consider the unique attributes of the judicial office in determining whether a State has violated Section 2. The same rationale would require courts to consider such factors in deciding what remedy is necessary to cure a Section 2 violation.[4]

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[4] Respondents' argument also proves too much. Because Section 5 applies to judicial elections, the creation of addi-

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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tional judgeships is subject to preclearance. See *Martin* v. *Haith*, 477 U.S. 901 (1986), summarily aff'g 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), and *Georgia State Bd of Elections* v. *Brooks*, 111 S. Ct. 288 (1990), summarily aff'g No. C.A. CV288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court) (both holding that Section 5 applies to the creation of new judgeships). See also *City of Lockhart* v. *United States*, 460 U.S. 125 (1983) (the change from a three-member to a five-member city council is a change requiring preclearance). Respondents do not explain why application of Section 2 to judicial elections imposes burdens that are more onerous than the ones that result from application of Section 5.

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